

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE JAMES CARTER,

Defendant-Appellant.

UNPUBLISHED

April 10, 2014

No. 313512

Wayne Circuit Court

LC No. 12-004094-FC

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant for the murder of Tarrence Talley under MCL 750.316. On appeal, defendant unconvincingly argues that: (1) the trial court abused its discretion when it allowed the prosecution to call a rebuttal witness; (2) there is insufficient evidence to sustain his conviction; and (3) his trial counsel was ineffective. For the reasons stated below, we affirm.

I. REBUTTAL EVIDENCE

“Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion.” *People v Figures*, 451 Mich 390, 398; 547 NW2d 673 (1996). “Because the scope of rebuttal is based on the trial court’s discretionary authority to preclude the trial from turning into a trial of secondary issues, it is the trial court that must, of necessity, evaluate the overall impression that might have been created by the defense proofs.” *Id.* “Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.” *Id.* at 399. As stated by the Michigan Supreme Court:

[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor’s case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *People v Bettistea*, 173 Mich App 106; 434 NW2d 138 (1988); *Nolte v Port Huron Bd of Ed*, 152 Mich App 637, 645; 394 NW2d 54 (1986). As long as evidence is responsive to material presented by the defense, it

is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [*Id.*]¹

Here, defendant wrongly claims that the trial court abused its discretion when it permitted the prosecution to call a rebuttal witness. After the prosecution rested its case, defendant called two witnesses to support his claim that he stabbed Talley in self-defense: one testified to defendant's injuries and statements about the murder he made at the hospital; the other attempted to undermine the testimony of two prosecution witnesses.

The prosecution's rebuttal witness addressed both of these points, by emphasizing that defendant rejected his attempt to break up the fight—defendant told the witness to: “[G]et the f--- out the way; I’m about to kill this n-----”—and that he saw defendant stab Talley “repeatedly.” This testimony responded to that of defendant's two witnesses, who presented defendant's version of events and tried to undermine the prosecution's case. The trial court therefore did not abuse its discretion when it permitted the testimony of the rebuttal witness. See *Figures*, 451 Mich at 398.²

II. SUFFICIENCY OF EVIDENCE

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court reviews the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Circumstantial evidence and reasonable inferences arising from it may be used to prove the elements of a crime. *People v Brantley*, 296 Mich App 546, 550; 823 NW2d 290 (2012). “The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor's favor.” *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

A conviction for first-degree murder requires proof that “the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Jackson*,

¹ This statement flatly contradicts defendant's assertion that the prosecution was required to offer the rebuttal witnesses' testimony in its case in chief.

² In any event, had the trial court's admission of the testimony been an error, defendant must show that the error resulted in a miscarriage of justice, which he fails to do. See *People v Lukity*, 460 Mich 484, 495–497; 596 NW2d 607 (1999); and *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013) (citation omitted) (Court of Appeals presumes that error is not “a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative”). Several witnesses testified that defendant stabbed Talley multiple times. The medical examiner testified that Talley suffered ten stab wounds, including one to the head, four to the left chest, one to the abdomen, one to the back, two to the buttocks, and one to the left upper arm. Therefore, defendant has failed to establish that the alleged error changed the outcome of his trial. See *Lukity*, 460 Mich at 495–497.

292 Mich App 583, 588; 808 NW2d 541 (2011). “Premeditation may be established through evidence of (1) the prior relationship of the parties, (2) the defendant’s actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant’s conduct after the homicide.” *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* It “may be merely seconds, or minutes, or hours, or more, dependent on the totality of the circumstances surrounding the killing.” *People v Conklin*, 118 Mich App 90, 93; 324 NW2d 537 (1982), overruled on other grounds by *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985).

Here, defendant wrongly asserts that there is insufficient evidence to sustain his jury conviction for first-degree murder under MCL 750.316. In fact, the prosecution presented ample evidence from which a rational trier of fact could conclude that defendant’s murder of Talley was both premeditated and deliberate, as required by MCL 750.316. Talley and defendant engaged in a fistfight for several minutes, which defendant ended by stabbing Talley. A witness testified that Talley stumbled into the middle of the street, and fell immobile on the ground. Defendant, instead of ending the violence at this point, proceeded to tell a bystander to “[g]et the f--- out the way” because he was “about to kill this n-----,” and then stabbed Talley at least six to seven times. And, as noted, the medical examiner testified at trial that Talley suffered ten stab wounds.

Therefore, viewing the facts in the light most favorable to the prosecution, the jury correctly concluded that defendant killed Talley with premeditation and deliberation per MCL 750.316.

III. INEFFECTIVE ASSISTANCE

To properly preserve an ineffective assistance of counsel claim, a defendant must move for a new trial or seek an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). Defendant did neither and the issue is therefore unpreserved. This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *Id.* Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Effective assistance of counsel is presumed. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish that “counsel’s representation fell below an objective standard of reasonableness.” *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland*, 466 US at 688. The defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). This Court determines whether, “in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Vaughn*, 491 Mich at 670, citing *Strickland*, 466 US at 690. In addition, the defendant must show that trial counsel’s deficient performance prejudiced his defense.

Strickland, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Vaughn*, 691 Mich at 669, citing *Strickland*, 466 US at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland*, 466 US at 694. “A claim of ineffective assistance of counsel may be based on counsel’s failure to properly inform the defendant of the consequences of accepting or rejecting a plea offer.” *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012).

In this case, defendant fails to show that trial counsel’s representation fell below an objective standard of reasonableness. He contends that his trial counsel’s assistance was ineffective because counsel told him to reject the plea offer. However, the record indicates that defendant had an opportunity to discuss the decision with his attorney. Defendant informed the trial court that he wished to proceed at trial, and stated that he made the decision voluntarily and knowingly. Moreover, his lawyer argued at trial that defendant killed Talley in self-defense, and presented evidence to support this assertion. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy, even if that strategy backfired, nor will it assess counsel’s competence with the benefit of hindsight. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).³

Affirmed.

/s/ Cynthia D. Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra

³ Defendant’s contention that his trial counsel rendered ineffective assistance because his attorney was subsequently suspended and disbarred is equally unavailing. The Attorney Discipline Board’s opinion states that trial counsel was disciplined for misconduct in an unrelated matter that did not involve defendant’s case. See *Grievance Administrator v Chambers*, 12-80-GA (October 24, 2013). Again, defendant fails to show that his trial counsel’s performance fell below an objective standard of reasonableness. See *Vaughn*, 491 Mich at 669.